No. 96-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,
v.
RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity in a suit under 42 U.S.C. § 1983 for her conduct in seeking an arrest warrant for the purpose of bringing a criminal defendant before the court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-792

LYNNE KALINA,
Petitioner,

v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.

One of the core functions of state and local governments is the enforcement of the criminal law through the office of the public prosecutor.

The public prosecutor serves a central role in the administration of criminal justice. As the State's advocate, "[a] prosecutor is duty bound to exercise his best judgment both in deciding which [cases] to bring and in conducting them in court." *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Public prosecutors, however, "[f]requently act[] under serious constraints of time and even information" as they are routinely "responsible . . . for hundreds of indictments and trials." *Id.* at 425-26. Both the common law and this Court have thus recognized that public prosecutors are entitled to absolute immunity for their role in initiating and conducting a prosecution. *Id.* at 421-31.

The conduct at issue here, involving a prosecutor's act of seeking an arrest warrant to secure the presence in court of a person formally charged with a crime, is fully within the scope of the absolute immunity previously recognized by the common law and this Court. A felony prosecution cannot go forward without the presence of the accused. *See Crosby v. United States*, 506 U.S. 255, 259 (1993). Seeking an arrest warrant for the purpose of compelling a defendant to appear in court and answer criminal charges is thus as integral to the initiation and conduct of a prosecution as is filing an information or seeking an indictment. The court of appeals' holding that this conduct is not within the scope of absolute immunity would have as harmful an impact on the administration of criminal justice as would denying

prosecutors' absolute immunity for the conduct at issue in *Imbler*.

Because the court of appeals' holding has serious consequences for the administration of criminal justice, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioner's statement.

SUMMARY OF ARGUMENT

1. This Court has "held that prosecutors are absolutely immune for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). The scope of prosecutorial immunity established by this Court's precedents fully encompasses Kalina's conduct in seeking an arrest warrant in conjunction with the initiation of a criminal prosecution against Fletcher.

In its analysis of prosecutorial immunity in *Imbler*, the Court carefully examined the common law, which has long held that prosecutors, like judges and grand jurors acting within the scope of their duties, have absolute immunity for their role in initiating and conducting a prosecution. 424 U.S. at 421-24. The common law immunity of prosecutors is founded on the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. *Imbler* held that these concerns "dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." *Id.* at 427.

The court of appeals ignored these controlling principles and erroneously analogized Kalina's conduct to that of a police officer seeking an arrest warrant in connection with an investigation, who is entitled only to qualified immunity. *See Malley v. Briggs*, 475 U.S. 335 (1986). While ostensibly invoking this Court's " 'functional' analysis," J.A. 25, the court of appeals overlooked that "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.' " *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (per curiam) (citation omitted). The function served by Kalina's motion for an arrest warrant was not the same as the function served by the arrest warrants in *Malley*.

The *Malley* warrants were sought as part of a criminal investigation; when the State presented the case to the grand jury it refused to return an indictment. In contrast, Kalina's purpose in preparing the certification in support of her motion for an arrest warrant was to compel Fletcher to appear in court to respond to the formal charges that had been filed against him. The information filed by Kalina did not compel Fletcher's presence in the courtroom. Because fundamental principles of criminal justice generally forbid trial *in absentia*, the filing of the motion for an arrest warrant and certification was an essential step in the commencement of the prosecution. The warrant and the underlying certification were thus an integral part of the initiation of the prosecution and

were in every sense "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *Lerwell v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983).

Fletcher erroneously contends that Kalina's challenged conduct arose out of her acting as a "complaining witness" in the same manner as a police officer or any citizen. As a prosecutor, Kalina was vested by state law with authority to determine whether complaints filed by citizens or police officers warranted the filing of criminal charges by the State. Thus, in preparing and filing her certification, Kalina was functioning as a "quasi-judicial officer," *Imbler*, 424 U.S. at 423 n.20, who is entitled to absolute immunity.

Although Fletcher suggests otherwise, *see* Opp. 14-18, there is an additional common law doctrine that supports immunity for Kalina in this case—the well-settled privilege of an attorney for conduct occurring during the course of judicial proceedings. This common law privilege covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." William L. Prosser, *Handbook of the Law of Torts* § 94, at 824 (1941) (citations omitted). It immunizes Kalina from suit at common law for allegedly making "false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution." J.A. 5 (Complaint ¶ 3.3). The common law tradition thus supports absolute immunity for Kalina's acts in preparing and filing the probable cause certification.

2. The *Imbler* Court supported its holding not only by an analysis of the common law of prosecutorial

immunity, but also by its conclusion that the "considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S. at 424. The same considerations of public policy that led to *Imbler*'s holding that absolute immunity was available to the prosecutor in that case support the recognition of absolute immunity for a prosecutor's act of seeking an arrest warrant in conjunction with the filing of criminal charges.

Just as the Court recognized in *Imbler*, denying Kalina absolute immunity would expose prosecutors to burdensome and distracting lawsuits. Subjecting prosecutors to suit for seeking a warrant in conjunction with the filing of charges would divert their time and attention "from the pressing duty of enforcing the criminal law." 424 U.S. at 425. As long as a suspect was not in custody at the time the prosecution was initiated, every prosecutor who failed to obtain a conviction would bear a substantial risk of being sued for her conduct in seeking a warrant. Not only would such litigation adversely affect the way in which prosecutors allocate their time, it would pressure prosecutors to engage in self-protective behavior antithetical to the fearless discharge of their responsibilities. *Id.* at 423-24.

While respondent's argument is couched in terms of Kalina's alleged "false statements" made "with reckless disregard for the truth," J.A. 5, the impact of an affirmance of the court of appeals would not be limited to such cases. Denying prosecutors absolute immunity for seeking arrest warrants in conjunction with the filing of criminal charges would subject them to suit simply for making mistakes in evaluating police files. This is of no small moment given both

the large number of prosecutions that end in dismissal or acquittal and the fact that "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler*, 424 U.S. at 425.

Other mechanisms exist to protect against the potential abuse of prosecutorial powers in filing for arrest warrants. Not only did Kalina, pursuant to state law, attest to the truthfulness of the assertions in her certification "[u]nder penalty of perjury," J.A. 20, prosecutors are subject to criminal prosecution under 18 U.S.C. § 242 for willful deprivations of constitutional rights. In addition, all prosecutors are subject to bar discipline for violating the rules of professional conduct. *See Imbler*, 424 U.S. at 429. "These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.*

ARGUMENT

A PROSECUTOR IS ENTITLED TO ABSOLUTE IMMUNITY FOR SEEKING AN ARREST WARRANT IN ORDER TO COMPEL A CRIMINAL DEFENDANT TO ANSWER CHARGES

This Court has long recognized that "prosecutors are absolutely immune for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)); *see also Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam). The Court has further explained that the prosecutor's absolute immunity extends to "'the duties of the

prosecutor in his role as advocate for the State [and] involve[s] actions preliminary to the initiation of a prosecution and actions apart from the courtroom.' " *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993) (quoting *Imbler*, 424 U.S. at 431 n.33).

The court of appeals ignored these precedents. Instead, it relied on *Malley v. Briggs*, 475 U.S. 335 (1986), which rejected a police officer's claim that he was entitled to absolute immunity for seeking an arrest warrant during the course of a criminal investigation. According to the court of appeals, "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." J.A. 27. Failing to consider the function served by the warrant which Kalina sought, the court concluded that "[t]o hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis." *Id.*

As explained below, the court of appeals erred in disregarding this Court's precedents clearly establishing that Kalina is absolutely immune for seeking an arrest warrant in order to compel Fletcher's appearance in court to answer criminal charges. Where, as here, a warrant is sought as part of the initiation of a criminal prosecution, a prosecutor is entitled to absolute immunity; *Malley* is not controlling. To hold otherwise would have grave consequences for the administration of criminal justice. The Court should therefore reverse the judgment below.

A. Under *Imbler*, A Prosecutor Is Entitled To Absolute Immunity For Her Conduct In Initiating A Criminal Prosecution

Notwithstanding its "literal sweep," Section 1983 did not abrogate those immunities which are " 'well grounded in history and reason.' " *Imbler*, 424 U.S. at 417-18 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). In determining whether an official is entitled to immunity, the Court conducts "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421.

In *Imbler* the Court extensively examined the common law of prosecutorial immunity. *See* 424 U.S. at 421-24. As the Court explained, the common law deemed prosecutors to be quasi-judicial officers who were entitled to absolute immunity for their role in initiating and conducting a criminal prosecution. *See id.* Moreover, the Court concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424.

As the Court recognized, a public prosecutor's duties are unique. A prosecutor is routinely assigned a large caseload and "inevitably makes many decisions that could engender colorable claims of constitutional deprivation" in initiating and conducting a criminal prosecution. *Id.* at 425. Because "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate," suits against prosecutors "could be expected with some frequency" and "could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds

of indictments and trials." *Id.* at 425-26. As the Court noted, "[t]he public trust of the prosecutor's office would suffer" and prosecutors' "energy and attention would be diverted from the pressing duty of enforcing the criminal law" if they were not entitled to absolute immunity for their conduct in initiating and conducting a prosecution. *Id.* at 424-25.

The Court further explained that "affording . . . only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Id.* at 426. Absolute immunity is essential to the criminal justice system's "goal of accurately determining guilt or innocence"; it encourages the prosecutor to present relevant evidence to the trier of fact. *Id.* Moreover, absolute immunity benefits criminal defendants in that "[t]he possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. Finally, the Court recognized that absolute immunity ensures that the focus of post-trial review will "not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427.

Imbler thus held "that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. This immunity is absolute and extends to all those activities which are "intimately associated with the judicial phase of the criminal process," *id.* at 430, and includes "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 431 n.33.

Subsequent to *Imbler* the Court has held that a prosecutor is entitled only to qualified immunity for "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273. The Court, however, has steadfastly adhered to its holding in *Imbler*. *See id.; see also Burns*, 500 U.S. at 487-92. As the Court stated in *Buckley*:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.

509 U.S. at 273.

The court of appeals ignored these precedents. Instead, it reasoned that "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*," and that "[t]o hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis." J.A. 27.

The court of appeals' reasoning is flawed. It erroneously assumes, without any analysis, that the purposes served by the arrest warrant sought by the police officer in *Malley* and the arrest warrant sought by Kalina are the same. But as this Court has explained, "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles v.*

Waco, 502 U.S. 9, 13 (1991) (per curiam) (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). *See also Roberts v. Kling*, 104 F.3d 316, 321 (10th Cir. 1997) ("[T]he acts themselves are not the focus of the functional approach. Instead, we examine the function a defendant's acts serve.").

In *Malley* the Court rejected a police officer's contention that he was entitled to absolute immunity for procuring arrest warrants during the course of a criminal investigation. 475 U.S. 337-45. The arrest warrants, however, were not sought following the returning of an indictment or filing of an information. Indeed, after the arrests of the respondents in *Malley*, a grand jury refused to indict them. *Id.* at 338. The case thus clearly involved conduct occurring in the exercise of the investigative function. As the Court explained in rejecting the officer's analogy between himself and a prosecutor:

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction.

475 U.S. at 342-43.

In contrast to the warrant at issue in *Malley*, Kalina had filed a criminal information charging Fletcher with a felony offense simultaneously with seeking the arrest warrant. *See* J.A. 13. Her purpose in preparing the certification for determination of probable cause and filing for the warrant was to compel Fletcher to respond in court to a formal criminal charge. *See id.* at 14. Indeed, Kalina would have been remiss in her duties under state law if she had not procured a warrant. *See* Wash. Rev. Code § 36.27.020(6). The warrant was thus an integral part of the initiation of a criminal prosecution and was in every sense "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *see also Buckley*, 509 U.S. at 273 ("acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity").

As the Tenth Circuit has explained:

> [A] prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of prosecution" under *Imbler*.

Lerwill v. Joslin, 712 F.2d 435, 438 (10th Cir. 1983). *See also Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1995); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549, 555-56 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Ehrlich v. Giuliani*, 910 F.2d 1220, 1223-24 (4th Cir. 1990).

To hold otherwise is to ignore the most fundamental principles of the criminal justice system. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892). The Confrontation Clause of the Sixth Amendment generally guarantees "the accused's right to be present in the courtroom at every stage of his trial," *Illinois v. Allen*, 397 U.S. 337, 338 (1970), and the Due Process Clause provides a criminal defendant with the "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). As a general matter, fundamental principles of criminal justice forbid trial *in absentia*. *See Crosby v. United States*, 506 U.S. 255, 259 (1993) ("It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent . . . a conviction will be set aside.") (quoting W. Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918)).

Moreover, neither the seeking and returning of an indictment nor the filing of an information compels the physical presence of a criminal defendant in court to answer the charge. As the Court noted in *Malley*, the act of obtaining an indictment or filing an information "is but the first step in the process of seeking a conviction." 475 U.S. at 343. Ancillary to the process of seeking a conviction is the act of obtaining the presence of the defendant in court for purposes of

holding the arraignment, setting bond and fixing the date for trial. The court of appeals' implicit conclusion that Kalina's conduct in seeking Fletcher's arrest is not "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, thus reflects a fundamental disregard of the operation of the criminal justice system.

That under Washington law "[a] defendant's presence can be obtained by summons as well as by arrest," Opp. at 10 n.5, does not alter the nature of the function a prosecutor performs in seeking an arrest warrant in conjunction with the initiation of formal criminal charges. A summons is generally not an appropriate mechanism for compelling the presence of persons accused of serious crimes, especially those involving the commission of bodily harm to other persons. *See* Wash. Crim. R. 2.2(b)(3). Moreover, a summons may be ineffective in securing a defendant's presence either because the defendant has moved and does not receive it or chooses to ignore it.

Thus, in many instances the prosecutor may have no choice but to seek the issuance of an arrest warrant if the State's case is to go forward.[2] The decision whether an accused poses a danger to others or is unlikely to respond to a summons is surely one which is committed to the prosecutor's discretion. And in preparing the necessary documents and appearing before a magistrate in order to obtain a warrant for the arrest of a person charged with a serious crime,

---

[2] In this case, the King County prosecutor repeatedly attempted to inform Fletcher by letters of the pending charges and the date of his arraignment. The warrant was executed nine months after its issuance and only after these letters did not result in Fletcher's appearance. J.A. 6, 12.

a prosecutor is engaged in classic advocacy on behalf of the State. *Cf. Burns*, 500 U.S. at 491 ("appearing before a judge and presenting evidence in support of a motion for a search warrant . . . clearly involve the prosecutor's 'role as advocate for the State' ") (quoting *Imbler*, 424 U.S. at 430-31).

Ignoring Kalina's function in filing for the arrest warrant, respondent instead asserts that her actionable conduct arose out of her "acting as a complaining witness." Opp. at 8. According to respondent, the certification "could as easily have been performed by 'a police officer or complaining witness.' " *Id.* (quoting Pet. App. 6a). Respondent further states that "[u]nder Washington law, any citizen can be a complaining witness," and that "[t]he nature of the 'conduct' at issue here—swearing to facts as a complaining witness—does not change according to the witness' official title." *Id.* at 12-13. *See also* Opp. at 4 (in preparing the probable cause certification, Kalina "took on a distinct role . . . of a 'complainant' or 'witness' ").[3]

[3] Respondent's assertion that Kalina acted as a "complaining witness" is mistaken. In preparing the probable cause certification, Kalina was merely relating the statements of others as contained in the police report; she did not profess to have first-hand knowledge of the facts set forth in the certification and would not have testified either at the warrant hearing or in a subsequent trial. *See* Pet. App. 17a (opening sentence of the certification) ("Lynn Kalina is a Deputy Prosecuting Attorney . . . and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054; . . . this case contains the following upon which this motion for the determination of probable cause is made.").

Relating the statements of others in a court filing in order to persuade a tribunal to rule the desired way is, of course,

This argument is flawed. It ignores that in applying for the warrant, Kalina did not stand in the same shoes as "any citizen" or a police officer. As the Court recognized in *Imbler*, the common law deemed a public prosecutor to be a "quasi-judicial officer" required to exercise discretion and independent judgment in determining whether to charge a person with a crime. *See* 424 U.S. at 423 n.20; *see also Malley*, 475 U.S. at 342-43. The Court endorsed this view in holding that the prosecutor's immunity as a quasi-judicial officer extended to Section 1983 actions. *See Imbler*, 424 U.S. at 424-29. As a public prosecutor, Kalina was vested by state law with authority to determine whether the complaints filed by "any citi-

classic advocacy. It is functionally indistinguishable from a lawyer's "making false or defamatory statements in judicial proceedings" or "eliciting false and defamatory testimony from witnesses," conduct which is absolutely immune under the common law and § 1983. *Burns*, 500 U.S. at 489-90. Moreover, the common law immunity extends to written statements as well. As a leading authority explains, the immunity covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." William L. Prosser, *Handbook of the Law of Torts* § 94, at 824 (1941) (citations omitted).

That Kalina certified that the statements made in the probable cause certification were "true and correct," Pet. App. 18a, does not demonstrate that she acted as a witness rather than the State's advocate. Lawyers routinely certify that the statements contained in the documents they file are correct; these acts do not transform them from advocates to witnesses. *Cf.* Fed. R. Civ. P. 11 ("[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, . . . the allegations and other factual contentions have evidentiary support").

zen" or a police officer warrant the initiation of formal criminal charges. It is thus disingenuous to suggest that Kalina acted in the same functional capacity as "any citizen" or a police officer in preparing and filing the documents necessary to effectuate Fletcher's arrest. *Cf. Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992) ("although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who [as private parties] set the wheels of government in motion by instigating a legal action") (citation omitted). Denying absolute immunity for this conduct, which is so "intimately associated" with the initiation of a criminal prosecution that without it the case cannot go forward, would circumvent *Imbler*.[4]

---

[4] The court of appeals also asserted that *Buckley* supported its holding that Kalina is not entitled to absolute immunity, presumably relying on the portion of the opinion discussing a prosecutor's immunity for conduct occurring while performing investigative functions. *See* J.A. 25-26; *see also Buckley*, 509 U.S. at 275 ("it would be anomalous . . . to endow [prosecutors] with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested").

Be that as it may, Kalina was not performing an investigative function when she sought Fletcher's arrest. Rather, she was engaged in the initiation of a criminal prosecution. Whether or not probable cause actually existed to believe Fletcher committed the crime is irrelevant; the absolute immunity recognized in *Imbler* encompasses claims that charges have been initiated without probable cause. *See* 424 U.S. at 421-24 (discussing *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *affirmed*, 275 U.S. 503 (1927) (per curiam), and *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)); *see also Buckley*, 509 U.S. at 275 n.5 ("we have found a common-law tradition of

Contrary to respondent's suggestion, *see* Opp. at 14-18, Kalina can point to a common law tradition demonstrating that her conduct is absolutely immune —the well-settled immunity of the attorney for conduct occurring during the course of judicial proceedings. As the Court observed in *Burns*, "prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . . and also for eliciting false and defamatory testimony from witnesses." 500 U.S. at 489-90. Moreover, the common law immunity covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." Prosser, *supra*, § 94, at 824 (citations omitted); *see also* Thomas M. Cooley, *The Elements Of Torts* 69 (1895) ("Pleadings and other papers filed by parties in the course of judicial proceedings are privileged; and so are affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice.") (footnotes omitted); 7 William Wait, *Actions and Defenses* § 2,

---

immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not").

It would thus be anomalous to hold that Kalina's decision to file charges is absolutely immune, but her companion decision to seek the issuance of an arrest warrant in order to proceed with the prosecution of those charges is not. Indeed, in both *Griffith* and *Yaselli*, which held that the prosecutors were absolutely immune, the plaintiffs alleged that the prosecutor had, following the indictment, caused their arrests without probable cause. *See Griffith*, 44 N.E. at 1002; *Yaselli*, 12 F.2d at 397. Neither case differentiated between the prosecutor's conduct in obtaining the indictment and causing the arrest. *Buckley* thus does not support the court of appeals' decision.

at 437 (1885).[5] The common law privilege thus fully encompasses the allegations respondent offers as the basis for his suit—that in the probable cause certification, "Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution." J.A. 5 (Complaint ¶ 3.3); *see also id.* at 5-6 (Complaint ¶¶ 3.4-3.7); Opp. at 1 ("Mr. Fletcher's allegation has always been limited to Ms. Kalina's separate and distinct action in 'prepar[ing] and fil[ing] a Certification for Determination of Probable Cause.'") (quoting Complaint).

In preparing the probable cause certification and filing it in court, Kalina functioned as an attorney for the State. She is thus entitled to the same absolute immunity which the common law has long conferred on attorneys for their role in judicial proceedings. *See Burns*, 500 U.S. at 489-91; Prosser, *supra*, § 94, at 824. And as explained below, the policy considerations which underlie the common law rule are equally applicable to § 1983 actions.

B. Absolute Immunity For Procuring An Arrest Warrant To Obtain The Presence Of A Person Charged With A Crime Is Necessary To Prevent Impairment Of The Criminal Justice System

Having determined that prosecutors were immune under the common law for their role in initiating and conducting a prosecution, the *Imbler* Court next concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S.

[5] *See also Kemper v. Fort*, 219 Pa. 85, 90 (1907); *Maulsby v. Reifsnider*, 69 Md. 143 (1888); *Burke v. Ryan*, 36 La. Ann. 951 (1884); *Hart v. Baxter*, 47 Mich. 198 (1881).

at 424. The very reasons that led to *Imbler*'s conclusion that absolute immunity applied to the prosecutor's conduct in that case support the recognition that absolute immunity applies to a prosecutor's act of seeking an arrest warrant in conjunction with the filing of criminal charges.

The *Imbler* Court first reasoned that given the frequency with which criminal defendants could sue prosecutors who had only qualified immunity, "the threat of § 1983 suits would undermine [the prosecutor's] performance of his duties" by constraining the prosecutor's decision-making for fear of "his own potential liability" and diverting his energy and attention to defend against such suits. *Id.* Second, affording prosecutors only qualified immunity "could have an adverse effect upon the functioning of the criminal justice system" by, among other things, limiting the prosecutor's discretion in the presentation of evidence by exposing prosecutors to potential civil liability for reliance on testimony later shown to be untruthful. *Id.* at 426. Finally, "[t]he ultimate fairness of the operation of the system itself could be weakened" by shifting the focus of post-trial proceedings away from whether the accused has received a fair trial to whether the prosecutor should be "called upon to respond in damages for his error or mistaken judgment." *Id.* at 427. Each of these considerations supports the conferral of absolute immunity on Kalina for her conduct in seeking an arrest warrant.

First, and foremost, just as in *Imbler*, denying Kalina absolute immunity would expose public prosecutors to burdensome and distracting lawsuits. While some States still require that felony prosecutions be initiated by grand jury indictment or may require that prosecutions for certain types of felonies be ini-

tiated through indictment, a majority of the States now allow for even felony prosecutions to be initiated by information. *See* 1 Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 6:37, at 220 (1986). Indeed, most criminal prosecutions are now initiated by information or complaint. Moreover, criminal suspects are frequently not in custody at the time a prosecutor reviews a police investigation and decides that charges should be filed.

Exposing public prosecutors to suit for seeking a warrant upon deciding to file charges would thus divert the time and attention of prosecutors "from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, to defending themselves against potentially numerous lawsuits. So long as a suspect was not in custody at the time the prosecution was initiated, every prosecutor who fails to obtain a conviction bears a substantial risk of being sued for her conduct in seeking a warrant. Like the prosecutor in this case, those who upon further review admit that their initial charging decision was mistaken can expect to be sued in every case.[6]

Such suits will adversely affect the way in which prosecutors allocate their time. Because the burdens of discovery and trial are onerous, prosecutors will

[6] Respondent mistakenly asserts that there is "no factual basis for Petitioner's concern that the decision below will result in a flood of litigation." Opp. at 24. That there have been few suits challenging this type of prosecutorial conduct is a reflection of the legal culture's understanding of the scope of prosecutorial immunity. *See Imbler*, 424 U.S. at 421-22 (discussing *Griffith*, 44 N.E. at 1002, which dismissed a false arrest claim brought against a prosecutor). It is not an indicator of the likelihood of such suits if the scope of the prosecutor's absolute immunity is altered to allow them.

spend more time defending themselves in depositions and trials and less time performing the vital function of protecting the public by prosecuting criminal offenders. Second, prosecutors will resort to various mechanisms of self-protective behavior which are of little benefit to society. One likely result is that prosecutors will present more cases to grand juries, notwithstanding the time-consuming nature of such proceedings, so that they can rely on the indictment to shield them from liability for seeking an arrest warrant. *See Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975) (citing *Ex parte United States*, 287 U.S. 241, 250 (1932)).

To be sure, prosecutors could engage in the self-protective device of "us[ing] the testimony of police officers or other witnesses, instead of their own, to support their warrant applications." Opp. at 26. But respondent's suggestion that the use of such affidavits would "insure a wrongly arrested citizen has recourse for any deliberate or reckless falsehood," *id.* at 27, ignores the consequences of depriving prosecutors of absolute immunity. If prosecutors were to use the testimony of police and other witnesses to support their warrant applications, it is a likely consequence of the Ninth Circuit's approach to functional analysis that prosecutors would be sued for allegedly relying upon insufficient affidavits or unreliable witnesses and informants in seeking an arrest warrant. *See, e.g., Malley*, 475 U.S. at 344-45; *Imbler*, 424 U.S. at 426. *Cf. Illinois v. Gates*, 462 U.S. 213 (1983). Prosecutors could also find themselves subject to suit for having obtained arrest warrants on the basis of evidence which was subsequently suppressed.

Moreover, even under the qualified immunity standard as reformulated in *Harlow v. Fitzgerald*, 457 U.S.

800 (1982), plaintiffs would frequently be able to subject prosecutors to burdensome depositions. The burden of defending themselves from such suits, which are nothing more than a backhanded way to subject prosecutors to liability for their otherwise immune charging decisions, would, of course, be quite onerous. As prosecutors' offices are frequently understaffed and confronted with a deluge of criminal activity, diverting their time, "energy and attention . . . from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, would harm the public interest in a most substantial way.

Respondent's suggestion would sweep far more broadly than providing recourse for the victim of a "deliberate or reckless falsehood." Opp. at 27. Denying prosecutors absolute immunity for seeking arrest warrants in conjunction with the filing of criminal charges would subject them to suit and the burden of discovery simply for making mistakes in evaluating or misreading police files. This is of no small moment as 27% of felony cases result in dismissal or acquittal, *see* Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1992* 26 (Table 21) (1995), and "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler*, 424 U.S. at 425.

Prosecutors are not infallible. The criminal justice system, however, has established procedures to protect an accused against unwarranted intrusions. These include the *Gerstein* hearing to determine whether probable cause exists to restrain a suspect's liberty pending trial, *see Gerstein*, 420 U.S. at 119-22, and the preliminary hearing to determine whether probable cause exists to proceed to trial. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 1.4, at 23-24 (5th ed. 1984); *see also State v. Knapstad*, 107 Wash.2d 346 (1986). The "focus" of these pretrial procedures "should not be blurred by even the subconscious knowledge that a . . . decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Imbler*, 424 U.S. at 427; *cf. Pierson v. Ray*, 386 U.S. 547, 554 (1967) (a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption").

Moreover, other mechanisms exist to protect against the potential abuse of prosecutorial powers in filing for arrest warrants. *Imbler*, 424 U.S. at 428-29. That prosecutors in Washington State attest to the veracity of the statements contained in a probable cause certification "under penalty of perjury," J.A. 20, is itself a shield against abuse. *See Imbler*, 424 U.S. at 429. In addition, state prosecutors are subject to criminal prosecution under federal law for "willful deprivations of constitutional rights." *Id.* (citing 18 U.S.C. § 242). Furthermore, as an attorney Kalina is subject to bar discipline for the violation of the rules of professional conduct. *See* Wash. Rules of Professional Conduct (1996). Indeed, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler*, 424 U.S. at 429 & n.30. As *Imbler* recognized, "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.* at 429.

Beyond blurring the focus of pre-trial proceedings, subjecting prosecutors to suit for seeking an arrest warrant in conjunction with the filing of criminal charges will adversely affect criminal defendants in another way. If, as occurred here, a prosecutor's voluntary dismissal of a case will be greeted by a lawsuit, prosecutors will be less likely to admit their mistakes. Even where prosecutors' offices assign the responsibility for filing charges and trying cases to different attorneys, the latter will review case files cognizant of the consequences of a voluntary dismissal. Prosecutors' offices could be expected to divert their resources to bolster cases in order to protect their fellow employees from suit. While this use of scarce prosecutorial resources might ultimately produce enough evidence to convict, the diversion of resources could also harm the prosecution of other, more important cases. Furthermore, it would lead to the ironic result that innocent defendants will be subjected to the anxiety of a continuing prosecution which, if prosecutors had absolute immunity, would have been promptly dismissed. Denying prosecutors absolute immunity for this conduct thus ill serves innocent defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

April 25, 1997